DATO' ONG KIAN SENG

v.

LIM KUT SHEONG & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SHAIK DAUD ISMAIL J
[CIVIL SUIT NO. D1-22-306-91]
21 DECEMBER 1991

LAND LAW: *Application to remove caveat - Whether a person who claims an interest in a specific portion of land may caveat the whole land - Effect - Construction of statute - Meaning and interpretation - Proviso to s. 322 (1) - Letter of undertaking with promise to pay brokerage in kind - Whether raises issue of caveatable interest - Whether specific performance - Balance of convenience - Whether plaintiff's claim quantifiable in terms of money - NLC 1965, s. 322(1) - NLC (Amendment) Act 1984.*

On an *ex-parte* application by the plaintiff, the Court granted an extension of a caveat lodged on 9 August 1991 until the final disposal of a suit by the plaintiff pursuant to s. 326(2) of the NLC 1965. By a summons in chambers inter parties, the 7th defendant in the said suit applied to have the caveat removed and cancelled.

On the basis of an agreement entered into by the parties in early 1986, approximately 348 acres of land was purchased in the name of two related companies of the 4th defendant - namely the 6th and 7th defendants. In view of the "good efforts and assistance" purportedly rendered by the plaintiff in the sale it was agreed that 30 acres of the subject land would be given to the plaintiff free of charge. This alleged undertaking was stated in a letter dated 7 February 1986 on the letterhead of the 4th defendant company and signed by the 1st defendant. On the aftermath of the said transaction, the plaintiff claimed specific performance of the said undertaking by the transfer of the said 30 acres of the subject land or to the value of the said 30 acres in lieu thereof in monetary terms.

Held:

[1] The proviso related to s. 322 of the NLC 1965 i.e. subsection (1) was added pursuant to NLC (Amendment) Act 1984, which came into effect on 25 March 1985. It is very clear that on a true construction of the said proviso, s. 322 (1) NLC (Amendment) Act 1984, no one may caveat the whole land if he claims only a portion of it. Therefore, this must mean that if one has an interest in part of the land one cannot caveat either that part or the whole land. In other words one cannot caveat the land at all.

[2] Looking at the letter itself and the circumstances which led to it being given, it does not meet the test of interest in land. The plaintiff is incapable of enforcing specific performance of the 30 acres and as such no caveatable interest has been created. On a balance of convenience, plaintiff's claim is quantifiable in terms of money. A person who claims an interest in a specific portion of land may caveat the whole land provided the effect of the caveat is to cover only the particular interest claimed.

[Caveat to be removed and defendant's application allowed with costs.]

Cases referred to:

Tee Chin Yong v. Ernest Jeff [1963] MLJ 118 ***(dist)***
Woo Yok Wan v. Loo Pek Choo [1975] 1 MLJ 156 ***(dist)***
Pok Chew Kai v. Yeoh Thian Seng & Anor. [1975] 1 MLJ 220 ***(dist)***

Vengadasalam v. Mahadhevan & Anor. [1976] 2 MLJ 161 ***(dist)***
Mosbert Bhd. v. Stella D'Cruz [1985] 2 MLJ 446 ***(foll)***
Investment and Merchant Finance Corporation Ltd. v. Kirkwood Estates Ltd. [1974] 5 ALR 191 ***(cons)***
Ho Ah Kim & Anor. v. Paya Terubong Estate Sdn.Bhd [1987] 1 MLJ 54 ***(foll)***

Legislation referred to:
National Land Code 1965, ss. 322(1), 326(2)

For the plaintiff - Narayanan; M/s. K.S. Narayanan & Associates
For the 7th defendant - Cyrus V. Das (S. Nantha Balan with him); M/s. Shook Lin & Bok

JUDGMENT

Shaik Daud Ismail J:

On 27 September 1991 on an *ex parte* application by the plaintiff (encl. (65)), I granted an extension of a caveat lodged on 9 August 1991 until the final disposal of a suit by plaintiff pursuant to s. 326(2) of the National Land Code 1965.

By a summons in chambers inter parties (encl. (71)) Giant Bay (M) Sdn. Bhd. the 7th defendant in the suit applies to have the said caveat removed and cancelled.

The background leading to this suit is that sometime in 1984 the plaintiff was granted a right by Genting Highlands Bhd for the purpose of developing a residential and hotel complex. In early 1985 on the proposal of first defendant, his associates and the plaintiff should form a joint venture company which will purchase the subject land. After considerable negotiations between the plaintiff and the first defendant in his personal capacity and for and on behalf of the 2nd to 8th defendants it was finally agreed in early 1986 that:

(a) the subject land to be sold by Genting Highlands Bhd. be purchased in the name of two related companies of the 4th defendant, namely the 6th and 7th defendants;

(b) that in view of the "good efforts and assistance" of the plaintiff in the sale it was agreed that 30 acres of the subject land would be given to the plaintiff free of charge.

This alleged undertaking is contained in a letter dated 7 February 1986 on the letterhead of the 4th defendant company and signed by the 1st defendant. This letter is exhibited as 'A' in encl. (70). It is the plaintiff's contention that notwithstanding the successful conclusion of the sale agreement and transfer of the subject land to the 6th and 7th defendants and notwithstanding that the defendants knew or deemed to have known of matters in para. (a) and (b) above, the said defendants and each of them have refused and/or failed despite repeated requests by the plaintiff, to transfer to the plaintiff free of charge 30 acres of the subject land. The plaintiff therefore claims specific performance of the said undertaking by the transfer of the 30 acres of the subject land or the value of the said 30 acres amounting to 26 million ringgit, damages and costs.

Now the law regulating private caveat is to be found in s. 322 of the National Land Code 1965, which state:

322. Nature and effect of private caveats.

(1) A caveat under this section shall be known as a "private caveat" and:

(a) may be entered by the Registrar on the register document of title to any land at the instance of any of the persons or bodies specified in s. 323;

(b) shall have the effect specified in subsection (2) or (3), recording as it is expressed to bind the land itself or merely a particular interest therein;

Provided that such a caveat shall not be capable of being entered in respect of part of the land.

The proviso to subsection (1) was added pursuant to the National Land Code (Amendment) Act 1984 which came into effect on 25 March 1985, before this date where was no such proviso. Under the old law a number of cases were decided on the question of whether a person who claims an interest in a specific portion of land may caveat the whole land, provided the effect of which is to cover only the particular interest claimed. They are *Tee Chin Yong v. Ernest Jeff* [1963] MLJ 118, *Woo Yok Wan v. Loo Pek Choo* [1975] 1MLJ 156 and *Pok Chew Kai v. Yeoh Thiam Seng & Anor* [1975] 1 MLJ 220. In all three cases the High Court decided that if you are interested only in a portion of land you cannot caveat the whole land. The High Court in *N. Vengadasalam v. Mahadhevan & Anor*. [1976] 2 MLJ 161 following the decision in the three cases mentioned above held the same view. On appeal the Federal Court put a rest to this and reversed the decision of the High Court and held the opposite. The Federal Court disapproved the decision in the above mentioned three cases.

Under the unamended law, the effect of the Federal Court decision is very clear. A person who claims an interest in a specific portion of land may caveat the whole land provided the effect of his caveat is to cover only the particular interest claimed.

It can safely be said that as a result of the *Vendagasalam's* decision, the law was amended to include the proviso to subsection (1) of s. 322 of the National Land Code 1965. It is contended by learned Counsel for the 7th defendant that in the light of the amendment, the caveat is bad in law as it offended the said proviso. With this contention I agree. The amendment has in fact re-instated the pre-*Vendagasalam's* decision, and all the three decisions (*supra*) are also restored. It is very clear that on a true construction of the proviso, no one may caveat the whole land if he claims only a portion of it, otherwise there could be a situation where a person claiming interest in a few hundred square feet comprising in a few thousand acres of land would be able to caveat the whole land thereby cause irreparable injury. No one who intended to have dealings with the landowner would consider dealing with him even if the caveat covers a small portion of the land. This surely cannot be the intention of the legislature. On this score alone it is my view that the caveat is bad in law and ought to be removed and cancelled.

Learned Counsel for the plaintiff on the other hand urges upon me to interpret the proviso that since a caveat shall not be capable of being entered in respect of a part of the land, it must therefore be entered on the whole land even when one has an interest in only a specific portion. As I said earlier it is obvious that the proviso was enacted to overcome the *Vendagasalam's* decision otherwise it is my view that it would not be necessary to enact the proviso in the first place. To interpret it as suggested by learned Counsel for the plaintiff would be saying that the *Vengadasalam's* decision is still good law. If that is so then in my view there would not be any need to enact the proviso at all. Section 322 could just as well be left alone as it was and let the decision in *Vengadasalam* rule the waves for such a situation.

In *Mosbert Bhd. (In liquidation) v. Stella D'Cruz* [1985] 2 MLJ 446 the respondent had contracted to purchase a private housing Lot No. 460 consisting of approximately 6000 square feet in Johore Grant No. 72 for Lot No. 83 in Plentong, one of the two pieces of lands which was proposed to be developed into a housing estate. The Johore Grant No. 72 contains an area of 113 acres 2 roods and 20 poles. It was argued before the Supreme Court that since

the respondent is claiming to have an interest in only 6000 square feet of the land she could not lawfully lodge a private caveat expressed to bind the whole land. *Tee Chin Yong v. Ernest Jeff, Woo Yok Wan v. Loo Pek Chee, Pok Chew Kai v. Yeoh Thian Seng & Anor.*, and *Vengadasalam v. Mahadevan & Anor*. (*supra*) were all cited and considered. In ordering the caveat to be removed George Seah SCJ (as he then was) at p. 448 came to this conclusion:

> It is plain that the caveat was intended to forbid the registration of any dealing affecting the whole land and was not confined to private Lot No. 460 only. In our opinion, the respondent was not entitled to lodge such a caveat when she is claiming a particular interest containing an area of approximately 6000 square feet therein.

I am bound by this decision. Even if I am to accept and apply the decision in *Vengadasalam's* case I am of the view that the plaintiff in the present case would not be able to meet the test therein, as he could not identify the 30 acres which he is claiming. The fact that the 30 acres are unidentifiable is conceded by plaintiff (see paras. 8 and 9 of his affidavit at enclosure (78)). The situation has become more complicated by the sub division of the 348 acres into two portions with two separate titles and two separate proprietors. Therefore on which portion should the 30 acres now be? Even without the sub division plaintiff could not identify the 30 acres and the sub division has therefore rendered this highly impossible.

Following the Supreme Court decision in *Mosbert Bhd. v. Stella D'Cruz*, it is plain in the present case that the plaintiff was not entitled to caveat the whole 348 acres when his alleged claim or interest is only confined to 30 acres.

It is my view that by the new proviso the intention of legislature is clear, one cannot caveat part of the land must mean that if one has an interest in part of the land one cannot caveat either that part or the whole land. In other words one cannot caveat the land at all.

The next issue raised by the defence is whether the alleged undertaking contained in the letter dated 7 February 1986 is a caveatable interest. It is contended by the defence that the undertaking does not constitute a caveatable interest because the very nature of the letter is in fact a promise to pay brokerage in kind to the plaintiff for services rendered. With this contention I agree. Looking at the letter itself and the circumstances which led to it being given it is my opinion that it does not meet the test of interest in land. If at all, it is an obligation or promise to pay a brokerage fee which was then expressed as an entitlement to 30 acres of land. This 30 acres was incapable of being identified and is now impossible of being identified. It is undisputed that in view of the massive development that has taken place and in view of third parties involvement (purchase of housing Lots) the plaintiff is incapable of enforcing specific performance of the 30 acres and as such no caveatable interest has been created. In *Investment and Merchant Finance Corp. Ltd. v. Kirkwood Estates Ltd.* [1974] 5 ALR 191 it was held that a caveatable interest is not created if there is no right to specific performance. In *Ho Ah Kim & Anor. v. Paya Terubong Estate Sdn. Bhd.* [1987] 1 MLJ 54 Mohamad Dzaiddin J., refused to grant specific performance where there was clear evidence of changes in the area of the said land.

Lastly I have to consider balance of convenience. There is no doubt that plaintiff's claim is quantifiable in terms of money, and indeed plaintiff appears to agree so since in the prayer to his statement of claim he is claiming RM26 million as an alternative as the value of the 30 acres. There is also this letter dated 8 December 1989 from defendant to plaintiff (which plaintiff has not denied receiving) where same parties have put a money value of RM1.2 million. Whether the value of the 30 acres is RM1.2 million or RM26 million is a question of fact which can be determined at the trial but there has been no denial that it is quantifiable.

As against that, the land in question has been extensively developed and the vital fact of the 30 acres being incapable of being identified, the balance of convenience therefore, is and must, be in favour of removing the caveat.

For all the above reasons I am of the opinion that the caveat ought to be removed and I so ordered it by allowing the application of the defendants with costs.

Also found at [1992] 1 CLJ 409